In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 611

CLINTON MARTIN FLEISHOUR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is not yet reported. The opinion of the United States District Court for the Northern District of Illinois is reported at 365 F. 2d 126.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1966. The petition for a writ of certiorari was filed on September 29, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Petitioner was assaulted and injured by a fellow prisoner in the federal penitentiary at McNeil Island,

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Washington. The question presented is whether the district court's finding—affirmed by the court of appeals—that federal prison officials were not negligent and exercised reasonable care for petitioner's safety is clearly erroneous.

STATUTES INVOLVED

The pertinent provisions of the Federal Tort Claims Act provide:

28 U.S.C. 1346(b):

> Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2674:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

* * * * *

STATEMENT

In this suit under the Federal Tort Claims Act,[1] petitioner sought to hold the United States liable for personal injuries which he suffered when attacked by a fellow prisoner at the federal penitentiary at McNeil Island, Washington. The facts are not in dispute. Petitioner and his assailant, one Troy Stringfellow, were young offenders serving sentences for violations of the Dyer Act.[2] Initially they were confined at the Federal Correctional Institution at Lompoc, California, an institution designed primarily for younger prisoners. However, neither was able to conform his behavior satisfactorily to the requirements of the relatively unrestricted Lompoc environment. For this reason both were transferred to the federal penitentiary at McNeil Island in the State of Washington. That institution contains older inmates under more restricted conditions.

At McNeil Island, petitioner and Stringfellow, together with other newly transferred prisoners, were temporarily assigned to the Admissions and Orientation Unit of the penitentiary. This was the regular procedure for all new inmates pending a review of their records and permanent assignment to a specific program within the prison. The Admissions Unit was quartered in a large dormitory room and in a series of single-occupant cells on three floors above the dormitory. At night, when the prisoners

[1] 28 U.S.C. 1346(b), 2671 *ff.*

[2] 18 U.S.C. 2311–2313 (interstate transportation of stolen motor vehicles).

were asleep, the entire unit was regularly patrolled by a correctional officer. Both petitioner and Stringfellow were assigned to sleep in the dormitory.

At 2:30 a.m. on December 16, 1962, just three days after their arrival at McNeil Island, Stringfellow struck petitioner with a wall-type fire extinguisher, inflicting substantial harm. Stringfellow was caught and restrained by other prisoners; petitioner, who stated that he had been unacquainted with Stringfellow until their arrival at McNeil Island, could suggest no motive for the assault.

The principal thrust of petitioner's complaint in the instant suit against the United States was that the prison authorities should have been aware of Stringfellow's propensity for violence and were, therefore, negligent in failing "to confine him to a single cell or private room under * * * constant supervision" (App. 5–6).[3] Additionally, petitioner urged that it was negligent to allow dangerous weapons, *i.e.*, wall fire extinguishers, to remain within the reach of the prisoners.

At the trial in the district court the government called as witnesses the heads of the penitentiary systems of the States of Missouri and Washington, both of whom were also familiar with federal prisons and concededly expert penologists, (App. 105, 156). Those witnesses testified that the procedures followed at the McNeil Island penitentiary were in accord with modern penological practice. Moreover, contrary to petitioner's contentions, the witnesses testified that it would have been penologically unsound to have segregated

[3] "App." refers to Appellant's Appendix in the court of appeals.

Stringfellow upon his arrival at McNeil Island penitentiary on the basis of his prior poor behavior record at the institution for youthful offenders. To have done so, they stated, would have been to mark him as a "tough" whom the authorities could not handle, with the result of reinforcing his undesirable behavior and making his rehabilitation far more difficult. Furthermore, they stressed that the most succesful means of reforming a young offender who has been misbehaving at a youth institution was to give him a fresh start in another penitentiary with a more restrictive atmosphere and an older inmate population where he could no longer throw his weight around. After examining Stringfellow's record at the youth institution, the witness rejected the suggestion that Stringfellow was a particularly serious behavior problem, no more so than was petitioner himself whose record was comparable (App. 145).

There was further testimony that it was practically impossible to remove all possible weapons from the hands of prisoners, that the presence of fire extinguishers in the dormitory was a necessity for the safety of the prisoners, and that there had never been any use of such fire extinguishers as weapons in the past (App. 129–131).

In addition, the head of the Washington State prison system testified that, had Stringfellow been in a Washington institution, he would not have been segregated but would have been allowed to sleep in a room with other prisoners (App. 167). He further testified, regarding prisoners transferred in Stringfellow's circumstances, that Washington would have

followed a practice similar to that used at McNeil Island, that is to say, a prisoner with a poor record at a previous institution "starts off clean" in the new institution (App. 172). He added that the prison practices under consideration at McNeil Island in this case fully met the degree of care that would be exercised by Washington State officials in similar circumstances (App. 166).

Petitioner offered no contrary evidence regarding proper prison practices.

At the conclusion of the trial the district court entered judgment in favor of the government, ruling (244 F. Supp. 762, 767):

> It was the opinion of all the experts who testified that the officials at McNeil had acted reasonably and in a manner consistent with accepted prison practices at the time here involved. In the face of such testimony, the court cannot conclude that plaintiff has established by a preponderance of the evidence that these officials were negligent and judgment must therefore be entered for the defendants.

The court of appeals affirmed, holding that the trial court's "determination finds support in the record and cannot be said to be clearly erroneous." (Pet. App. 4a).

ARGUMENT

In this Federal Tort Claims Act suit, petitioner sought to prove the United States liable for injuries inflicted upon him by a fellow inmate in a federal prison. The district court dismissed the action after a trial on the merits, ruling that petitioner had failed

to establish negligence on the part of the prison officials. The Seventh Circuit affirmed the dismissal as supported on the record and not "clearly erroneous." Those decisions do not conflict with decisions of this or any other court, involve no issues of constitutional dimension, and present only contested questions of fact which both lower courts resolved against petitioner. Further review by this Court is therefore not warranted.

1. As both courts below correctly observed, under the Federal Tort Claims Act the government's liability in this case is measured by the law of Washington State where the tortious conduct allegedly occurred.[4] Under Washington law, a person is not liable in tort without proof of negligence;[5] custodial officials are presumed to have carried out their duties properly; one claiming injury as the result of their negligence has the burden of coming forward with evidence sufficient to rebut that presumption;[6] and the existence of such negligence is an issue to be resolved by the trier of facts.[7] The trial court's opinion makes clear that it properly applied those standards. After a careful review of the evidence before it, the district court ruled that petitioner had failed to establish his allegations of negligence "by a

[4] 28 U.S.C. 1346(b); *Richards* v. *United States*, 369 U.S. 1. See Pet. App. 3a and 244 F. Supp. at 766–767.

[5] *United States* v. *Coffey*, 233 F. 2d 41 (C.A. 3).

[6] *Eberhart* v. *Murphy*, 113 Wash, 449, 194 Pac. 415; *Riggs* v. *German*, 81 Wash. 128, 142 Pac. 479.

[7] *Perry* v. *Seattle School District No. 1*, 66 Wash. 2d 800, 804, 405 P. 2d 589, 592.

preponderance of the evidence," (244 F. Supp. at 767). It found instead that (244 F. Supp. at 764):

> The officials charged with maintenance of the United States Penitentiary at McNeil Island, Washington, carried out their duties with reasonable care under all the circumstances and therefore without negligence toward the plaintiff.

As the court of appeals noted in affirming the judgment dismissing the complaint, the trial court's decision is supported by evidence in the record and is not clearly erroneous (Pet. App. 4a). The correctness of factual findings, concurred in by two courts below, is not an issue meriting re-examination by this Court. *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275.

2. Petitioner is mistaken in his contentions that the courts below failed to apply the proper standard of care due a federal prisoner and that, therefore, the instant case conflicts with the decisions in *United States* v. *Muniz*, 374 U.S. 150, and *Cohen* v. *United States*, 252 F. Supp. 679 (N.D. Ga.). As we noted above, the trial court based its determination against petitioner on its conclusion that the McNeil Island prison officials discharged their responsibilities towards him "with reasonable care under all the circumstances." Essentially the same standard of care was imposed by the district court in Georgia in the *Cohen* case, when it held that prison officials are required "to exercise ordinary care for the prisoner's protection and to keep him safe and free from harm." 252 F. Supp. at 687. In *Muniz*, the

Court dealt only with the issue of whether a federal prisoner was barred from bringing suit under the Federal Tort Claims Act by virtue of his prisoner status alone. Because the district courts had dismissed the complaints of both petitioners in *Muniz* before trial, the Court did not there address itself to the precise standard of care due all federal prisoners.

Petitioner's contention (Pet. 9) that the trial court applied a "doctrine of calculated risk" in deciding the issue of negligence is, as the court of appeals stated, a misinterpretation of the district court's use of that phrase. Read in the context of the opinion, that language was used by the court in refutation of petitioner's argument—advanced again here—that prisoners with "assaultive tendencies" must be kept in constant isolation if the government is to avoid tort liability for injuries stemming from inmate quarrels. The courts below properly rejected that contention as incorrect in law and undesirable in practice.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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